GANISON KRISHNASAMY A

v.

KONG SII CHENG & ANOR

HIGH COURT SABAH & SARAWAK, SIBU B
SUPANG LIAN J
[CIVIL APPEAL NO: SBW-12BNCVC-1-11-2013]
2 MAY 2014

DAMAGES: *Appeal - Appeal against award - Assessment - Whether manifestly excessive or unjustified - Whether assessment supported by reasons and authorities - Whether court entitled to vary or substitute award* C

DAMAGES: *Personal injuries - Loss of future earnings - Claim for pensions - Whether an item of special damages - Whether to be specifically pleaded - Whether failure to plead fatal - Whether loss of pension proven - Whether claim for pensions sustainable* D

DAMAGES: *Personal injuries - Loss of earning capacity - Army personnel - Whether highly sought after by private sector upon retirement - Whether plaintiff employable after injuries - Whether earning capacity would be drastically reduced - Whether entitled to loss of earning capacity* E

The plaintiff ('appellant'), while riding his motorcycle, was involved in a road traffic accident with a lorry tanker, driven by the first F defendant ('first respondent), which was owned by the second defendant ('second respondent'). The Sessions Court Judge found that the first respondent was wholly to blame for the accident and that the appellant was not guilty of contributory negligence. Hence, liability was attributed to the respondent 100%. The trial G judge awarded general damages for pain and suffering and serious injuries, post-trial and pre-trial cost of care to the appellant. However, the appellant's claim for loss of income, loss of future income and/or loss of earning capacity was not allowed. Hence, the appellant appealed against the decision of the trial judge H dismissing the appellant's claims for general damages for loss of income, loss of future income and/or loss of earning capacity, namely, loss of pension and loss of income and/or earning capacity post retirement from the army. The respondents, on the other hand, cross appealed that the decision of the trial judge be varied I to the extent and the grounds of liability and quantum of damages

granted, *inter alia* (i) in general damages for pain and suffering; (ii) for post-trial cost of care; (iii) for pre-trial cost of care and (iv) out of pocket expenses. The respondents contended that the trial judge had erred in law and in fact and had misdirected himself in finding that the first defendant was wholly to blame for the accident.

Held (allowing appeal in part; dismissing cross-appeal against liability and allowing cross-appeal against quantum in part):

(1) There was nothing perverse about the finding of 100% liability attributed to the first respondent as it was based on: (i) the evidence of PW1, supported by the evidence of PW10, an eye witness; (ii) evidence of PW6 the expert evidence reconstructionist; and (iii) the silent evidence. The trial judge had not so fundamentally misdirected himself that one may say that no reasonable court, which had properly directed itself and asked the correct questions, would have arrived at the same conclusion that the first respondent was wholly to blame for the accident and the respondents were 100% liable. (para 8)

(2) Pension, if claimable, would constitute an item of special damages which has to be specifically pleaded. However, the appellant's claim for loss of pension was not pleaded. Therefore, the appellant should not be allowed to claim that which was not pleaded as it had caught the respondents by surprise. In any event, the appellant had not proven on a balance of probabilities that he would lose his pension should his services in the army be prematurely terminated. The appellant had also not called any witness that could testify on the pension scheme applicable to him and the amount of monthly payments payable, if any. Hence, the appellant's claim for pension was not sustainable. (para 10)

(3) Employees with military background such as the appellant were highly sought after in the private sector. However, given the physical disabilities of the appellant, it was beyond doubt that the appellant would not be employable in the capacity which would otherwise be available to him if he was normal and healthy when he goes on compulsory retirement. There was more than sufficient evidence that the earning capacity of the appellant would be drastically reduced when he retires and the appellant was therefore entitled to loss of earning capacity.

The appellant was thus awarded the sum of RM192,000.60 taking into account the multiplicand of RM2,133.34 and the multiplier of 7.5 years. (paras 12, 13 & 14)

(4) There were neither reasons nor supporting authorities provided by the trial judge for arriving at the assessment of awards for pain and suffering and the loss of amenities, thus entitling the court to vary or substitute the awards if found to be manifestly excessive or unjustified. Based on the facts and the authorities, it was held that cross-appeal: (i) on the quantum for pain and suffering was allowed and varied; (ii) on the award for pre-trial and post-trial cost of case was dismissed but the quantum was varied; (iii) against getting up costs was dismissed; and (iv) against the out of pocket expenses was varied and reduced. (paras 16-21)

Case(s) referred to:

Dasarudin Mursiyo v. Ku Meng Ya Chee Wan @ Ku Chang Ken & Anor [2007] 1 PIR [55] 375 ***(refd)***

Jasveer Singh Jeet Singh v. Ewe Yee Wah [2010] 1 PIR [23] ***(dist)***

Lee Eng Chuan v. Png Kun Seoh [2011] 1 PIR [60] ***(refd)***

Lim Eng Chiew v. Muhamad Azmil Ramli [2009] 2 PIR [48] ***(refd)***

Low Suit (MW) & Tan Mee Kiau v. Lim Sun Hiang & Anor [1992] 2 CLJ 1035; [1992] 2 CLJ (Rep) 813 HC ***(refd)***

Maziah Ahmad v. Md Razak Darus [2007] 1 PIR [46] ***(refd)***

Mohd Fala Anuar & Anor v. Gunalan Mariappan & Anor [2011] 1 PIR [18] ***(refd)***

Mohd Sufian Asahaari v. Md Ali Ithnin [2007] 1 PIR [7] ***(refd)***

Mohd Zaini Hashim v. Zulkifli Mohd Noor [2008] 2 PIR [22] ***(refd)***

Muzashah Mohamad v. Helmi Shahruddin [2009] 1 PIR [54] ***(refd)***

Palanisamy Sella Pan & Anor v. Daniyel Nokman [2008] 2 PIR [52] ***(refd)***

Paramasivam Savy Peruman v. Ibrahim b Mohd Amin [2008] 2 PIR [10] ***(dist)***

Rebecca Mathew & Ors v. Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor [1989] 1 LNS 136 HC ***(refd)***

Rohani Tengkah v. Zainal Lani & Anor [2004] 2 CLJ 108 HC ***(refd)***

Saifudeen Apandi & Anor v. Lenggang anak Nuing [2011] 1 PIR [65] ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A(2)(d)(ii)

Rules of Court 2012, O. 55 r. 8

For the appellant - Shankar Ram; M/s Thomas, Shankar Ram & Co, Advocs
For the respondents - William Ting; M/s Tang & Partners, Advocs

Reported by S Barathi

A

JUDGMENT

Supang Lian J:

Introduction

B **[1]** On 30 July 2010 at about 10.15 in the evening a road traffic accident occurred at Jalan Kem Oya Sibu at the 14th Mile, Sibu involving a lorry tanker and a motorcycle. The appellant, a member of the Armed Forces (plaintiff in the Sessions Court), was the rider of the motorcycle whereas the first respondent (first C defendant in the court below) was driving the lorry tanker which was owned by the second respondent (the second defendant). I will refer to the parties as they were in the Sessions Court. The plaintiff was badly injured and brought an action against the defendants for loss and damages for the negligent driving of the D first defendant. After a full trial, the learned Sessions Court Judge found the first defendant wholly to blame for the accident and the plaintiff not guilty of contributory negligence. Hence, liability was attributed to the defendants at 100%.

E **[2]** The trial judge assessed and awarded damages as follows:

(a) General damages for pain and suffering and serious injuries

(i)	Cerebral concussion and brain injury	... RM150,000
(ii)	R 2nd rib fracture with right pneumothorax	... RM 25,000
(iii)	closed fracture proximal 1/3 R femur	... RM 40,000
(iv)	closed fracture R humerus intercondyle	... RM 20,000
(v)	closed fracture R ulnar styloid	... RM 20,000
(vi)	closed fracture R index finger proximal phalange	... RM 10,000
(vii)	R brachial plexus injury	... RM 20,000
(viii)	Permanent scarring	... RM 20,000
	Total	... RM365,000
	Award (Less 20% for overlapping)	... RM292,000

(b) General damages for loss of income, loss of future income and/or loss of earning capacity

(i) Loss of pension: dismissed as it was not pleaded in the SOC;

(ii) Loss of income and/or earning capacity post retirement from the army: dismissed as it is too remote and speculative;

(iii) Post trial cost of care or future care with assistance of a domestic helper valued at RM1,100 per month: - allowed at RM299,112;

(iv) Pre-trial costs of care (July 2010 to October 2013) 40 months x RM800 per month : allowed at RM32,000; and

(v) Special damages : allowed at RM2,591.

Thus, the total award of damages was RM625,703 to be paid by the first and second defendants jointly to the plaintiff.

[3] Interests was ordered as follows:

(i) At 5% p.a. on general damages for pain and suffering and serious injuries from date of writ (23 October 2012) until full and final settlement; and

(ii) At 5% p.a. on post-trial cost of care or future care and pre-trial costs of care (special damages) from 21 November 2013.

[4] Finally, the first and second defendants were ordered to jointly pay costs to the plaintiff in the sum of RM106,987.46 (getting up RM40,000 and out of pocket expenses RM66,987.46) with interest at 4% p.a. from 21 November 2013 until full settlement.

The Appeal

[5] The plaintiff has appealed against such part only of the decision of the trial judge dismissing the plaintiff's claims for general damages for loss of income, loss of future income and/or loss of earning capacity, namely: (i) loss of pension - dismissed as it was

not pleaded in the SOC; and (ii) loss of income and/or earning capacity post retirement from the army - dismissed for being too remote or speculative.

The Cross-Appeal under O. 55 r. 8 RC 2012

[6] The first and second respondent had filed a notice of cross-appeal that the decision of the trial judge be varied to the extent and on the following grounds:

(i) that the plaintiff is 50% contributory negligent in the said accident and the trial judge had erred in law and in fact in finding that the accident was solely caused by the negligence of the first defendant;

(ii) that PW1, PW10, PW12 and PW13 are not credible witnesses;

(iii) that the plaintiff should be awarded RM136,000 for general damages for pain and suffering as the award of RM292,000 is manifestly excessive and unjustified;

(iv) that post-trial cost of care shall not be allowed as the plaintiff needs only minor assistance from his mother and sister, and/or in the alternative, the services rendered by the family members should be valued at RM400 per month;

(v) that the plaintiff's claim for pre-trial cost of care shall be valued at RM400 per month; and

(vi) that the first and second defendants shall not pay cost to the plaintiff in the sum of RM106,987.46.

Liability

The Defendants' Arguments

[7] The defendants argue that the trial judge had erred in law and in fact and had misdirected himself in finding that the first defendant was wholly to blame for the accident on grounds as follows:

(i) failing to consider that the point of collision was in the middle of the road. This shows that the plaintiff was equally contributory negligent by driving near the centre of the road at the time of the accident;

(ii) failing to consider the defects in the sketch plan as PW2 who prepared the sketch plan could not even confirm whether the scratch mark was caused by the accident in question;

(iii) failing to consider that the expert findings of PW6 were based on the sketch plan which were faulty because it could not be confirmed whether the scratch mark was caused by the accident;

(iv) in accepting PW10 as a credible witness although his testimony had very much departed from the photographs of the post-accident scene and the evidence given by PW6, the accident reconstructionist;

(v) failing to consider that PW3, PW4 and PW10 are not independent witnesses as they are members of the army;

(vi) failing to consider that PW1's ability to explain in court without any difficulty as to how the accident happened and his previous activities in the army contradicts PW7's evidence that PW1 suffered from 'poor memory' as a result of permanent brain injuries suffered; and

(vii) failing to consider that PW10's evidence was inconsistent with the post-accident photographs taken by PW2 and PW6's evidence that the road was dark and visibility was low at the time of the accident.

This Court's Finding

[8] The finding of liability by the trial judge is based on his evaluation of the evidence adduced by both sides. It is trite law that an appellate court will not readily interfere with the finding of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. The trial judge had the advantage of seeing the witnesses and observing their demeanour while testifying and was in a better position to assess credibility. This court should be slow to interfere with the finding of facts of the trial judge and the assessment of credibility unless the finding is so perverse. To my mind there is nothing perverse about the finding of 100% liability attributed to the first defendant for it is based on the evidence of PW1, supported by the evidence of PW10, an eye witness; the evidence of PW6, the expert accident reconstructionist; and the silent evidence. In the circumstances, I

find and hold that the trial judge had not so fundamentally misdirected himself that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion that the first defendant was wholly to blame for the accident and the defendants therefore 100% liable. The cross appeal against finding on liability is dismissed and the decision of the trial court affirmed.

Pension

[9] It is common ground between the parties that it is a requirement by law that all army personnel will retire after 21 years of service. The parties have also agreed that in the case of the plaintiff, the 21 years of service will come to an end only in July 2016 when he turns 40. However, the plaintiff gave evidence that due to his physical disabilities from his injuries sustained in the accident, his service in the army would be terminated on 6 March 2014. The plaintiff suggested that his premature retirement on 6 March 2014 would cause him to lose his pension. He therefore claimed for the loss of his pension which he calculates to be RM326,304.

[10] With respect, I agree with the trial judge that this claim is not sustainable. For one thing, pensions are pre-determined monthly or periodic payments receivable by a person upon his retirement. For that reason, I would have thought that pension, if claimable, would constitute an item of special damages which has to be specifically pleaded. However, the plaintiff's claim for loss of pension is not pleaded. I agree with the trial judge that the plaintiff should not be allowed to claim that which is not pleaded as it has caught the defendants by surprise. In any case, from the evidence of PW1, PW3, PW4 and PW10, it is clear that none of them was in the position to say with authority that PW1's service in the army would be terminated in March 2014 by reason of his injuries. PW1 himself when recalled on 25 October 2013 testified that he was "not sure whether [his] services will be extended after the 18 years but he heard from Tuan Danesh (PW3) and other officers that [his] services will not be extended". Secondly, none of the witnesses called by the plaintiff was in a position to state with certainty that the plaintiff will not be receiving his pension should his service in the army were prematurely terminated in March 2014. It is true that PW10 had testified that the plaintiff's service in the army would not be continued and that he would

not be receiving his pension, but it turned out that his evidence on this was hearsay as he later testified that he heard of this from his superior and from all the people in the camp. None of the plaintiff's superiors were called to confirm this in court. I find therefore that the plaintiff had not proved on balance of probabilities that he would lose his pension in the event his service in the army were prematurely terminated by March 2014. Thirdly, the plaintiff had not called any witness that could testify on the pension scheme applicable to him and the amount of monthly payments payable, if any.

[11] For the reasons stated, the plaintiff's claim for loss of pension was not proven. The trial judge, in my view, had not erred in dismissing it.

Loss Of Income, Loss Of Future Income And/or Loss of Earning Capacity Post Retirement

[12] As mentioned, the parties have agreed that arising from the requirement in law that all army personnel will retire after 21 years of service, the compulsory date of retirement for the plaintiff would be in July 2016 when he turns 40. The plaintiff had adduced evidence through PW11, an events and media consultant that employees with military background such as the plaintiff (who was a boxer in the army) are highly sought after in the private sector in many companies and security firms because of their discipline and training background. He said that people with the plaintiff's credentials could command a monthly salary of RM4,000 with incentives. However, given the physical disabilities of the plaintiff, PW11 stated that no employer in the security business would consider employing the plaintiff as he would not be able to perform his duties. In the circumstances, it is beyond doubt that the plaintiff when he goes on compulsory retirement in July 2016, would not be employable in a capacity which would otherwise be available to him if he were normal and healthy. Hence, I find that there is more than sufficient evidence that the earning capacity of the plaintiff will be drastically reduced when he retires in July 2016. The plaintiff therefore is entitled to loss of earning capacity.

[13] Learned counsel for the plaintiff has conceded that the plaintiff is still able to find some sort of simple job at a pay of RM800 per month which is the minimum wage requirement of the Labour Department. In the face of the evidence of PW11 that

the plaintiff, if he were healthy and normal, could earn RM4,000 a month in the private sector after retirement, the loss in earning capacity is RM3,200 (RM4,000 - RM800). Nevertheless there should be a deduction of 1/3 to account for living expenses: see *Rohani Tengkah v. Zainal Lani & Anor* [2004] 2 CLJ 108; *Low Suit (MW) & Tan Mee Kiau v. Lim Sun Hiang & Anor* [1992] 2 CLJ (Rep) 813; [1992] 2 CLJ 1035; and *Rebecca Mathew & Ors v. Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor* [1989] 1 LNS 136; [1990] 1 MLJ 443. The multiplicand should therefore be RM2,133.34 (RM3,200 - RM1,066.66 [RM3,200 x 1/3]).

[14] The calculation of the multiplier on the other hand is governed by s. 28A(2)(d)(ii) of the Civil Law Act 1956. It is to be noted that the parties have agreed that the plaintiff was 33 years old at the time of accident. However, since it was established that the loss in earning capacity will only come about when the plaintiff retires at the age of 40, learned counsel for the plaintiff had agreed that the age to be taken should be 40 and not 33. Accordingly, the number of years purchase shall be calculated by using the figure 55, minus the age of the plaintiff at the time of retirement and dividing the remainder by the figure 2. The multiplier should therefore be calculated as follows: (55 - 40) ÷ 2 = 7.5. We arrive at 7.5 years.

[15] Accordingly, I award to the plaintiff loss of earning capacity in the sum of RM192,000.60 (RM2,133.34 x 7.5 years x 12 months).

General Damages For Pain And Suffering

[16] The total award of the trial court for pain and suffering "and serious injuries" is RM365,000 (but reduced to RM292,000 after deducting 20% for overlapping). I note that the learned trial judge in his full grounds of decision dated 21 January 2014 (see pp. 6-25 of supplementary record of appeal) neither gave his reasons nor the supporting authorities for arriving at the assessment of awards given for pain and suffering and the loss of amenities. In the circumstances, this court is entitled to vary or substitute the awards if found to be manifestly excessive or unjustified.

(a) Cerebral concussion and brain injury (RM150,000)

- although the brain injury was not pleaded, evidence of it was adduced in court without objection. It cures the defect in pleading. However, I agree with the defendants that the fact

that the plaintiff could testify in court and claimed to remember the accident and previous events clearly meant that any impairment in memory loss could not have been as severe to warrant an of RM150,000.

This court's finding - award of RM150,000 is manifestly excessive and reduced to RM50,000: see *Dasarudin Mursiyo v. Ku Meng Ya Chee Wan @ Ku Chang Ken & Anor* [2007] 1 PIR [55] 375.

(b) Right 2nd rib fracture with right pneumothorax (RM25,000)

- Plaintiff refers to *Paramasivam Savy Peruman v. Ibrahim Mohd Amin* [2008] 2 PIR [10]. The case can be distinguished because the award is RM25000 for the fracture of 2 ribs (7th and 8th) with haemathorax.

- Defendants refer to *Lim Eng Chiew v. Muhamad Azmil Ramli* [2009] 2 PIR [48]: RM8,000 for fracture of left 7th and 8th ribs with left pneumothorax.

This court's finding: Award of RM25,000 is manifestly excessive and reduced to RM10,000.

(c) Closed fracture of proximal 1/3 right femur (RM40,000)

- Plaintiff: *Jasveer Singh Jeet Singh v. Ewe Yee Wah* [2010] 1 PIR [23] - RM40,000 for closed fracture of right femur with 1.5 cm shortening

- Defendants: *Saifudeen Apandi & Anor v. Lenggang anak Nuing* [2011] 1 PIR [65] - RM35,000 for closed fracture of proximal 1/3 of the right femur.

This court's finding: *Jasveer Singh* to be distinguished because of the 1.5cm shortening. Award reduced to RM35,000.

(d) Closed fracture right humerus intecondyle (RM25,000)

- Plaintiff: *Palanisamy Sella Pan & Anor v. Daniyel b Nokman* [2008] 2 PIR [52] - RM18,000 for fracture of lower third of left humerus

- Defendants: *Lee Eng Chuan v. Png Kun Seoh* [2011] 1 PIR [60] - RM18,000 for closed fracture of neck of right humerus with stiffness and pain during cold weather of the right shoulder.

A This court's finding: Award of RM25,000 is manifestly excessive and is reduced to RM18,000.

(e) Closed fracture right ulnar styloid (RM20,000)

B This court's finding: Award of RM20,000 is affirmed - see *Mohd Zaini Hashim v. Zulkifli Mohd Noor* [2008] 2 PIR [22] where RM22,000 was the award for fracture of distal end of left radius and ulnar styloid.

(f) Closed fracture right index finger proximal phalanx (RM10000)

C - Plaintiff: *Maziah Ahmad v. Md Razak Darus* [2007] 1 PIR [46] - RM25,000 for closed fracture of proximal phalanx of left little and ring finger and closed fracture of left 2nd to 5th metacarpal (6 fingers - (RM25,000 ÷ 6 = RM4,166.66 each)).

D - Defendant: *Mohd Fala Anuar & Anor v. Gunalan Mariappan & Anor* [2011] 1 PIR [18] - RM5,000 for closed comminuted fracture of proximal phalanx of right index finger.

This court's finding: Award of RM10,000 for a single fracture
E of the finger is manifestly excessive and is reduced to RM5,000.

(g) Right brachial plexus injury (RM65,000)

F - Plaintiff: *Mohd Sufian Asahaari v. Md Ali Ithnin* [2007] 1 PIR [7] - RM60,000 for complete left brachial plexus injury with permanent total loss of movement and sensation from shoulder to fingers of the left hand as a result.

G - Defendants: *Muzashah Mohamad v. Helmi Shahrudddin* [2009] 1 PIR [54] - RM60,000 for right brachial plexus injury with subclavian artery injury.

This court's finding: Trial judge did not give reasons and supporting authority for the award of RM65,000. It is reduced
H to RM60,000 in keeping with the authorities cited by both parties.

(h) Permanent scarring (RM20,000)

- there is no cross-appeal against this award.

I

- Award of RM20,000 is affirmed.

Total is RM218,000

Deduct 10% for overlapping (RM218,000 - RM21,800) = RM196,200.

Post Trial Cost Of Care

[17] In my view, the trial court did not misdirect itself in finding that the plaintiff will require care from a domestic helper. It is not in dispute that the minimum wage requirement set by the Labour Department is RM800 per month. This ought to serve as the yardstick for the wages of a domestic helper. There is unchallenged evidence adduced that the Malaysian average male life expectancy is 71 years. Thus the multiplier is: 71 years - 40 years (retirement age) = 31 years. However, 1/3 ought to be deducted for contingencies and vicissitudes of life: (31-10.33 years) = 20.67 years. Accordingly, the post-trial cost of care is:

(20.67 x RM800 x 12 months) = RM198,432

The award of the trial court is accordingly varied to RM198,432.

Pre-trial Cost Of Care

[18] This should be from 10 August 2010 (date of discharge from hospital) to October 2013: 39 months x RM800 = RM31,200. Hence, the trial court's award is varied to RM31,200.

Getting Up Costs

[19] Taking into account that trial was for nine days, 15 witnesses, and plaintiff had failed in the claim for pension, RM40,000 is reasonable for getting up. Decision of trial court affirmed.

Out Of Pocket Expenses

[20] The defendants conceded the payment of RM13,000 to PW6 for his professional fees. This should be allowed. I agree that the balance of RM53,987.46 should not have been allowed as the plaintiffs have not proved them by producing any receipt. Hence, the award for out of pocket expenses is varied to RM13,000.

Conclusion

[21] The cross-appeal against the finding of liability is dismissed and the decision of the trial court attributing liability to the defendants at 100% is affirmed. The appeal against the rejection of the claim for pension is dismissed but the appeal against the rejection of loss of earning capacity is allowed in the sum of RM192,000.60. Save for the award of RM20,000 for closed fracture of the right ulnar styloid which is maintained, the cross-appeal against the quantum for pain and suffering is allowed and varied as indicated above. After variation the total award for pain and suffering and loss of amenities is RM196,200. The cross appeal against the award for pre-trial and post-trial cost of care is dismissed but the quantum is varied to RM198432 for post-trial cost of care and RM31,200 for pre-trial cost of care. The cross-appeal against getting up costs is dismissed and the award of RM40,000 maintained. Whereas, the cross-appeal against the out of pocket expenses substantially succeeds to the extent of RM53,987.46. The out of pocket expenses is varied and reduced to RM13,000 only. Given that both the appellant and the respondents have succeeded in part in their respective appeal and cross-appeal, there will be no order as to costs of the proceedings.